

TESTIMONY OF

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ON BEHALF OF

THE

NATIONAL MULTI HOUSING COUNCIL/

NATIONAL APARTMENT ASSOCIATION

JOINT LEGISLATIVE PROGRAM

BEFORE THE

HOUSE COMMITTEE ON FINANCIAL SERVICES

SUBCOMMITTEE ON FINANCIAL INSTITUTIONS AND

CONSUMER CREDIT

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Good morning Chairman Bachus, Ranking Member Sanders, and distinguished members of this Subcommittee. I am Julie Smith, President of Bozzuto Management Company, an owner, developer, and manager of apartments in the mid-Atlantic region. It is my pleasure to appear today on behalf of the National Multi Housing Council/National Apartment Association Joint Legislative Program to discuss the experience of apartment providers and the rental housing industry with the Fair Credit Reporting Act (FCRA).

The National Multi Housing Council and the National Apartment Association represent the nation's leading firms participating in the multifamily rental housing industry. Our combined memberships are engaged in all aspects of the apartment industry, including ownership, development, management, and finance.

To summarize my testimony, NMHC/NAA believe that eliminating the current uniform federal treatment of adverse action notices, consumer report contents, and furnisher obligations can be expected to impose new operational costs on rental housing firms and increase uncertainty about the credit and legal history of our residents. These increased operating costs and risks, could, we believe, have a material impact on the cost and availability of rental housing. Further, recent state legislative proposals addressing consumer data demonstrate the benefits of FCRA's system of functional regulation. These state proposals suggest that, given new powers, states may opt to regulate in a patchwork fashion, varying coverage of their consumer data laws by industry, rather than by function, as the FCRA does. Finally, while we support the continuation of the national preemptions now found in FCRA, we support efforts by Congress and the Administration to develop new measures to address identity theft problems that have gained wider national attention since the enactment of major changes to FCRA in 1996.

1. FTC has found "high level" of industry compliance with FCRA

Millions of rental and employee applicant transactions annually are subject to the Fair Credit Reporting Act. Rental housing providers use consumer rental, credit, and criminal history in their decisions to accept, accept with conditions, or reject applicants for rental housing. The consumer reporting system also communicates timely information about an individual who has defaulted on a lease obligation without paying rent or damages owed. Finally, consumer reports are an important tool for verifying the background of employee applicants and thus reducing the risk of negligent hiring practices.

The Federal Trade Commission's (FTC) review of rental housing industry compliance with FCRA has been positive, and the agency has provided useful industry-specific compliance education as a result of its reviews. In testimony before the Senate Committee on Banking, Housing, and Urban Affairs on May 20, Howard Beales, Director of the FTC's Bureau of Consumer Protection, pointed to the "high level of compliance with the adverse action requirements of the Act" that FTC staff found in a national compliance review of rental housing providers. "Using Consumer Reports: What Landlords Need to Know," which the FTC released following its review, has been a beneficial educational reference for the industry.¹ To promote FCRA compliance, NMHC/NAA support the development of this kind of industry-specific compliance education.

¹ The guidance can be found at <http://www.ftc.gov/opa/2002/01/fcraguide.htm>.

2. The expiration of Section 624's preemptions could raise operating costs and risks for rental housing in three areas

The uniform national standards that FCRA now provides have increased the usefulness of consumer report information – and thus enabled rental housing providers to make more informed decisions about resident and employee applicants. The January 1, 2004 expiration of current state law preemptions under Section 624 of the FCRA,² however, raises concerns for rental housing providers in three specific areas: (1) adverse action notices, (2) permissible consumer report information and the obsolescence of that information, and (3) consumer data furnishers' statutory obligations.

Adverse Action Notices - Without additional Congressional action, the expiration of Section 624's pre-emption of state laws addressing Sections 615 (a) and (b) beginning next year could mean that rental housing firms operating in multiple states would be required to provide many more versions of adverse action notices under circumstances that would vary with each jurisdiction.³ Following the FTC's useful industry compliance guidance noted above, rental housing providers are typically providing standard-form adverse action notices in the vast majority of states under uniform conditions – e.g., where a resident applicant is either declined or accepted with qualifications based on his/her consumer report. Adverse action notices provided by rental housing owners are promoting wider awareness of consumer history that, in turn, can be used to improve the accuracy of file data where consumers access and review their report and dispute inaccurate data. NMHC/NAA are concerned about the higher operating costs that could result from a legal regime where the content of the adverse action notice and the circumstances under which it is provided varies with each jurisdiction.

Consumer Report Contents and Obsolescence - Permitting states to vary the content of what information may be included in consumer reports, as the expiration of Section 624's pre-emption of the obsolescence limitations and other provisions in Section 605 would do, could substantially expand crime and credit risk for rental housing owners and residents.⁴ With the expiration of the pre-emption of Section 605, it appears that states would be permitted to block rental housing providers from accessing criminal history, bankruptcy filings, civil judgments, and "any other adverse item of information" contained in consumer files, no matter how recently the underlying event, conviction, or judgment had occurred.

Although Section 624 (d) would limit states to adopt after January 1, 2004 only those consumer data laws that give "greater protections to consumers,"⁵ this limitation could still allow states to permit wider deletion of consumer legal and credit history information from consumer reports, perhaps on the ostensible rationales that negative credit or legal history compromises an applicant's "fresh start" or right to privacy.

NMHC/NAA believes that creating new opportunities for states to delete information from consumer reports based on varying policy rationales compromises the national consumer data system. On a national basis, rental housing residents and providers

² See FCRA Section 624 (d). References in this testimony to "Section..." are to the Public Law section numbers of the Fair Credit Reporting Act, unless otherwise noted.

³ See FCRA Section 624 (b)(1)(C).

⁴ See FCRA Section 624 (b)(1)(E).

⁵ See FCRA Section 624 (d)(2)(C).

could bear the hardship of states that decided to use this new authority to restrict the availability of negative criminal and credit history. For example, a resident or employee applicant from a state that had decided to restrict disclosure of prior sexual offender history – as some states already do following Megan’s Law – could very well be obligated to document that he/she was not a sex offender wherever the applicant’s application to rent or work included a reference to time spent in the non-disclosing state.

NMHC/NAA are concerned that a rental housing provider’s ability to mitigate crime risks on the community it owns by screening out applicants with criminal history profiles could be significantly compromised by the ability of states to restrict the sharing of criminal history data through consumer reports. Naturally, a state law (or municipal ordinance enacted under a state enabling law) that restricted the disclosure in consumer reports of prior criminal history would make it easier for criminals to opt not to disclose prior crimes – and more difficult for rental housing providers to detect the failure to disclose.

Finally, NMHC/NAA are concerned about the expanded ability states would have, with the expiration of this pre-emption, to erase from consumer histories material credit history information, such as an applicant’s recent history of eviction, lease default, property damage, or bankruptcy. Facing increased uncertainty about an applicant’s credit history, rental housing providers would be less able to accurately price the risk of applicant default. As a result, many housing providers would be obligated to reject or accept with qualifications a resident applicant they would have accepted under the current system.

Furnisher Obligations – Section 624’s existing pre-emption of state laws (outside of Massachusetts and California) governing furnishers’ duties provides benefits that should also be preserved.⁶

Expiration of the preemption on furnishers’ duties would likely create varied, new state-imposed furnisher duties that might not track the realities of reasonable business practices, particularly in industries such as rental housing where small businesses predominate. For example, a state might choose to specify a short amount of time for a furnisher to conduct an investigation upon notice of a dispute under FCRA Section 623 (b). This mandate may appear to provide additional consumer benefit – but, in practice, the state standard may well promote hurried, inaccurate investigations if the state deadline does not provide adequate time for small companies as well as large companies to undertake a full and fair investigation.

FCRA currently provides businesses with standards of care and deadlines that are capable of being implemented. These provisions, in the experience of NMHC/NAA members, have worked well to balance customers’ and users’ desire for file accuracy with furnishers’ business practices. Were the duties of furnishers left to the states to define, the operational practices of rental housing providers furnishing consumer data would have to be adapted and updated with the advent of each new statutory change.

⁶ See FCRA Section 624 (b)(1)(F).

3. Recent state law proposals demonstrate the benefits of extending uniform national standards

State legislative proposals to permit file-freezing and applicant-supplied reports, as well as state proposals that substitute industry-by-industry regulation for FCRA's functional regulatory model, have surfaced in the past few years. A short review of the impact of these proposals gives some insight into what might happen to the national consumer data system were this Congress to permit the beneficial uniform national standards now found under FCRA to expire.

For example, state legislative proposals that would permit an employee or resident applicant to freeze his consumer report raise risks that a housing provider will rent to an individual who has developed a history of crime or negative credit history since the date the file was frozen. Laws which require a rental housing provider to take a consumer report submitted by a resident or employee applicant also raise the risk that the housing provider will accept a resident or hire an employee whose report omits material negative criminal or credit history.

The current reporting system enables more accurate and reliable decisions about an applicant's criminal and credit history than could be made if applicants were able under state law to freeze their applicant file or supply their own, unauthenticated consumer reports. The current federal statute's preemptions provide safeguards necessary to ensure that consumers may not manipulate the data in their file to present a picture that selectively deletes material, accurate information that does not reflect well on the consumer.

Recent state consumer reporting legislative proposals indicate a trend toward exempting certain industries from coverage on a one-by-one basis, in place of the more uniform, function-by-function regulation now found in the FCRA. The current version of FCRA appropriately treats covered entities uniformly by their function (e.g., furnisher, user) instead of variably by industry sector or corporate form. Yet state law proposals, such as the version of Texas S.B. 473 proposed earlier this year, would exempt some rental housing providers but not others from the bill's new requirements for matching criminal history. The Texas proposal also distinguished between criminal and credit history information, requiring new identity matching requirements for credit information used by all rental housing providers but not for criminal information. In contrast, the FCRA generally provides for uniform treatment of criminal and credit history. We believe this example of uniform treatment in the current FCRA system is preferable.

4. Apartment providers share public concerns over identity theft crimes

We share the concerns voiced by members of this committee and witnesses before it about the crime of identity theft, which has received increased public attention since the passage of the last major changes to the FCRA in 1996. The Act imposes duties on rental housing providers furnishing consumer information to verify disputes. Thus, where identity theft has compromised a person's rental, credit, or criminal history, the FCRA provides a resolution mechanism for victims to work with rental housing providers and other furnishers to correct records that have been compromised.

Specific protections against unauthorized use of resident information are also accomplished through contracts between rental housing providers and with consumer

data suppliers, which impose specific operational safeguards against unauthorized employee access to consumer data. We believe that existing contractual practices provide important safeguards, in addition to the federal statutory requirements, that can be flexibly adjusted to reflect future crime risks, technological capabilities, and operational solutions in a way that no federal or state statute alone can. These voluntary practices should be considered as part of any solution to provide new tools to fight identity theft.

We look forward to working with this Congress and the Administration to address identity theft concerns in the context of the extension of the state law preemptions now found in FCRA. The expiration of the existing preemptions presents an opportunity to maintain uniform national standards while providing new tools to address crimes such as identity theft that have gained greater prominence since 1996.

THE NMHC/NAA JOINT LEGISLATIVE PROGRAM AND THE APARTMENT INDUSTRY

The National Multi Housing Council represents the principal officers of the apartment industry's largest and most prominent firms. The National Apartment Association is the largest national federation of state and local apartment associations. NAA is comprised of 163 affiliates and represents more than 30,000 professionals who own and manage more than 4.6 million apartments. NMHC and NAA jointly operate a federal legislative program and provide a unified voice for the private apartment industry.

Apartments and rental housing play a major role in our economy. One-third of Americans rent their housing, and 15 percent live in an apartment (defined as a building with 5 or more units). The value of the nation's entire apartment stock (buildings with 5 or more units) alone is \$1.3 trillion. Rental revenues from apartments total almost \$100 billion annually, and management and operation of apartments are responsible for approximately 500,000 jobs. Construction of apartment communities has added roughly 250,000 new apartment homes in each of the past three years. The value of the new construction has averaged more than \$17 billion annually, providing jobs to more than 200,000 workers.

Apartments are a central part of the solution to the nation's affordable housing needs. At the same time, apartments are the solution for the increasing proportion of Americans who rent by choice, preferring the convenience and flexibility of rental housing to homeownership. According to Fannie Mae's 2001 Annual Housing Survey, 41 percent of renters rent out of choice and not out of economic necessity. That number is up significantly from 32 percent in 2000 and 28 percent in 1999.

Finally, apartment and rental housing owners are predominantly small businesses. Under Small Business Administration (SBA) guidelines, 99 percent of the operators of residential rental housing qualify as small businesses.⁷

⁷ SBA defines a real estate concern as a small business when its total "annual receipts" are no more than \$5 million. "Annual receipts" are defined at 13 CFR 121.104 as "total income" plus "cost of goods sold," in the same manner these terms are defined or reported to the Internal Revenue Service.